

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES LEE BLAYLOCK,

Defendant-Appellant.

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UNPUBLISHED

June 16, 2009

No. 278221

Wayne Circuit Court

LC No. 06-013464-01

Before: Wilder, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted by a jury of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to 85 months to 20 years for the armed robbery conviction and a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm defendant's convictions and sentence for felony-firearm, but remand for further proceedings regarding defendant's sentence for armed robbery and for correction of the presentence report.

Defendant was convicted of robbing Douglas Bartell, an off-duty police officer, at gunpoint as Bartell was leaving his family's business on October 23, 2006. Bartell provided the police with a description of the suspect and described the gun used in the offense as a nickel-plated semi-automatic handgun, possibly .45 caliber. Defendant was arrested one day after the offense for carrying a concealed weapon after he was found in possession of a nickel-plated, semi-automatic, nine-millimeter handgun. One week after the offense, Bartell identified defendant in a photographic array as the gunman. The principal defense at trial was misidentification.

I

Defendant first argues that defense counsel was ineffective for failing to present an expert witness on eyewitness identification, and for failing to move to suppress Bartell's pretrial

identifications of defendant. These issues were addressed at a posttrial *Ginther*<sup>1</sup> hearing. Following the hearing, the trial court denied defendant's motion for a new trial.

Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's findings of fact in relation to an ineffective assistance of counsel claim are reviewed for clear error, and whether those findings establish a claim of ineffective assistance of counsel is reviewed de novo as a question of law. *Id.*

To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant that he was denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v Johnnie Johnson, Jr.*, 451 Mich 115, 124; 545 NW2d 637 (1996).

#### A. Failure to Present an Expert Witness

Defendant first argues that counsel was ineffective for not pursuing the appointment of a defense expert in eyewitness identification.

"Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Marcus Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). This Court will also not assess counsel's competence with the benefit of hindsight. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Defendant must overcome the strong presumption that his attorney exercised sound trial strategy. *Davis, supra*. "Furthermore, the failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

At the posttrial *Ginther* hearing, defendant presented Dr. Solomon Fulero, who was qualified as an expert in the psychology of eyewitness identification and the collection of eyewitness evidence. Dr. Fulero testified regarding various factors that are likely to enhance and impair the accuracy of a witness's ability to describe and identify a crime suspect. In particular, Dr. Fulero believed that collection of identification evidence within eight hours of a crime was crucial because memories can fade over time. He also testified that the presence of a weapon impairs the accuracy of a crime victim's identification of a suspect, and that police officers are no better at identifying suspects than laypersons. With respect to photographic arrays, Dr. Fulero believed that it was preferable to display a photograph one at a time and require the witness to state whether he or she recognized the person depicted as the perpetrator, rather than present the

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<sup>1</sup> *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

witness with a group of photographs and ask the witness if he or she recognized anyone in the group as the perpetrator.

The trial court determined that defendant would not have been entitled to the appointment of an expert on eyewitness identifications even if counsel had requested one, because such an expert was not necessary for defendant to safely proceed to trial and because such an expert was not the prevailing norm in the Wayne Circuit Court. The court also found that defendant was not prejudiced by the absence of an expert because defense counsel was able to attack Bartell's identification testimony in other ways.

MCL 775.15 provides a trial court with discretion to appoint an expert witness for an indigent defendant upon request. *People v Carnicom*, 272 Mich App 614, 616-617; 727 NW2d 399 (2006). The statute requires a defendant to show that an expert's testimony is required to enable the defendant to "safely proceed to a trial." To be entitled to the appointment of an expert witness,

an indigent defendant must demonstrate a nexus between the facts of the case and the need for an expert. *People v Jacobsen*, 448 Mich 639, 641; 532 NW2d 838 (1995). It is not enough for the defendant to show a mere possibility of assistance from the requested expert. [*People v*] *Tanner*, [469 Mich 437, 443; 671 NW2d 728 (2003)]. Without an indication that expert testimony would likely benefit the defense, a trial court does not abuse its discretion in denying a defendant's motion for appointment of an expert witness. *Jacobsen*, *supra* at 641. [*Carnicom*, *supra* at 617.]

In this case, the testimony at the *Ginther* hearing demonstrated that an expert such as Dr. Fulero possibly could have assisted the defense at trial, but defendant failed to make the necessary showing that such an expert was necessary for defendant to safely proceed at trial. We disagree with defendant's analogy between the need for an expert on eyewitness identifications and the need for an expert to analyze DNA evidence. The purpose of the latter is to conduct scientific analysis of actual evidence collected in a case where such evidence is incapable of being independently evaluated by a layperson. Conversely, an identification expert is not called upon to scientifically analyze actual evidence, but rather to provide general testimony regarding factors that possibly might enhance or impair the accuracy of a witness's perception of, or ability to recall, identifying features. In addition, unlike DNA evidence, which is beyond the understanding of a common layperson, it is within the general understanding of common laypersons that memories and perceptions are sometimes inaccurate.

The trial court here stated that identification experts are not the professional norm in the Wayne Circuit Court. While we do not agree that such an observation, even if true, necessarily precludes a court from appointing an identification expert, we agree that the record in this case does not establish the appropriate showing of need for such an expert. In this case, counsel was able to challenge the strength and reliability of Bartell's identification testimony through more traditional means. Through his cross-examination, counsel elicited apparent discrepancies and arguable bases for questioning the reliability and accuracy of Bartell's perception of the crime and identification of defendant. He elicited that the robbery occurred during a span of 40 to 50 seconds and that Bartell's attention was at times focused on the handgun possessed by the perpetrator. He also elicited that Bartell, a veteran police officer for 30 years, described the

weapon used during the crime as a .45-caliber handgun, whereas the weapon defendant possessed when he was arrested was a nine-millimeter handgun. Counsel also cross-examined Bartell regarding his identification of defendant in the photographic array, eliciting that the array was conducted approximately a week after the crime, that two of the photographs depicted men who were much older than the suspect Bartell had described, and that some of the photographs depicted men without mustaches, unlike the suspect Bartell had described. In addition, counsel cross-examined the officer who conducted the photographic array, eliciting that there were differences in the ages of the men depicted in the various photographs, and that the photographs did not convey the heights and weights of the men pictured. Under the circumstances, because defense counsel was able to challenge the reliability and accuracy of the identification evidence through appropriate means of cross-examination, defendant has failed to show either that counsel was ineffective for failing to request the appointment of an identification expert, or that he was prejudiced by the absence of such an expert at trial.

#### B. Pretrial Identification

Defendant also argues that defense counsel was ineffective for not moving to suppress Bartell's pretrial identification at the photographic array on the ground that the array was unduly suggestive. The trial court found, and we agree, that the photographic array was not unduly suggestive and, therefore, counsel was not ineffective for failing to file a motion to suppress.

"An identification procedure that is unnecessarily suggestive and conducive to irreparable misidentification constitutes a denial of due process." *People v Kevin Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). An identification procedure can violate a defendant's right to due process when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). To prove a due process violation, the "defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification." *Williams, supra*, quoting *People v Kurylczuk*, 443 Mich 289, 302; 505 NW2d 528 (1993).

Even if a pretrial identification procedure is found to be impermissibly suggestive, an in-court identification by the witness is still permissible if the prosecution demonstrates, by clear and convincing evidence, that the witness had an independent basis for the identification. *Gray, supra* at 114-115. The following facts are considered in determining whether an independent basis for an identification exists:

(1) [P]rior relationship with or knowledge of the defendant; (2) opportunity to observe the offense, including length of time, lighting, and proximity to the criminal act; (3) length of time between the offense and the disputed identification; (4) accuracy of description compared to the defendant's actual appearance; (5) previous proper identification or failure to identify the defendant; (6) any prelineup identification lineup of another person as the perpetrator; (7) the nature of the offense and the victim's age, intelligence, and psychological state; and (8) any idiosyncratic or special features of the defendant. [*People v Thomas Davis*, 241 Mich App 697, 702-703; 617 NW2d 381 (2000).]

Our review of the photograph array in this case discloses that it is not unduly suggestive. Although there are differences in age among the six men, they all appear within an appropriate range for the description of a suspect in his 20s. All six men have short dark hair, are of the same race, and each has a similar size face. Two of the men do not appear to have mustaches, but the remaining four men have facial hair. Because facial hair is easily removed, the absence of facial hair on two of the men does not render the array as a whole unduly suggestive. Furthermore, although Dr. Fulero explained at the posttrial *Ginther* hearing that other procedures could have been used to enhance the accuracy of an identification, a due process violation is established only if the procedure employed was calculated to lead to a substantial likelihood of misidentification. Here, the record discloses that Bartell was presented with photographs of six different men and told that the person who robbed him may or may not be depicted in the photographs. This procedure was not calculated to lead to a substantial likelihood of misidentification. Accordingly, because there is no basis for finding that the photographic array was unduly suggestive, defense counsel was not ineffective for failing to file a motion to suppress on this ground.

Furthermore, even if the photographic array could be considered suggestive, defendant was not prejudiced by the failure to file a motion to suppress because the record discloses that an independent basis for Bartell's identification of defendant existed. Bartell testified that he had a good opportunity to observe the gunman during this offense. His description of the gunman has not been shown to be inaccurate. Defendant was arrested the next day with a nickel-plated, semi-automatic handgun, similar to the gun described by Bartell. Although the gun was nine-millimeter, not .45-caliber as described by Bartell, testimony indicated that the two types of weapons are similar in appearance.

Defendant also argues that the preliminary examination was unduly suggestive because he was the only black male seated at the defense table. But given Bartell's prior identification of defendant in the photographic array and the existence of an independent basis for Bartell's identification of defendant, a motion to suppress on this ground would not have been successful. Therefore, counsel was not ineffective for failing to file a motion. *LeBlanc, supra*.

## II. Sentencing

Next, defendant argues that he is entitled to resentencing on his robbery conviction because the trial court departed from the sentencing guidelines range of 42 to 70 months without stating a substantial and compelling reason for departure, contrary to MCL 769.34(3). We disagree.

Contrary to what defendant argues, the record indicates that the trial court determined that prior record variable (PRV) 7 was properly scored at ten points, and that the resulting guidelines range was 51 to 85 months. Defendant does not dispute that if PRV 7 is scored at ten points, the appropriate guidelines range is 51 to 85 months. Thus, the issue whether defendant's armed robbery sentence is within the guidelines range or constitutes a departure from the guidelines range turns on the scoring of PRV 7.

PRV 7 addresses subsequent or concurrent felony convictions. MCL 777.57(1)(b) provides that ten points are to be scored if the offender has one subsequent or concurrent conviction. MCL 777.57(2)(a) directs the court to "[s]core the appropriate point value if the

offender was convicted of multiple felony counts *or was convicted of a felony after the sentencing offense was committed*” (emphasis added). A felony-firearm conviction is not to be considered for purposes of scoring PRV 7. MCL 777.57(2)(b).

The presentence report (PSIR) indicates that defendant was convicted of attempted carrying a concealed weapon (CCW) for an offense that was committed the day after the robbery in this case. CCW is a felony, subject to a statutory maximum sentence of five years. MCL 750.227. Attempted CCW is therefore also a felony. See MCL 750.92. Because defendant was convicted of this felony after the sentencing offense was committed, it qualifies as a subsequent conviction that may be scored under PRV 7. Thus, the trial court did not err in determining that the appropriate guidelines range was 51 to 85 months. Because the trial court sentenced defendant within this range, it was not required to state a substantial and compelling reason for defendant’s sentence.

### III. Accuracy of the Presentence Report

Defendant next argues that the presentence report contains inaccurate information. Defendant concedes that he did not challenge the accuracy of the PSIR at sentencing or in a post-sentencing motion. Generally, a defendant’s failure to challenge the accuracy of the PSIR before or at sentencing, or in an appropriate post-sentencing motion, waives review of the issue for appeal. MCR 6.429(C); *People v Sharp*, 192 Mich App 501, 504-505; 481 NW2d 773 (1992). However, defendant also argues that defense counsel was ineffective for failing to challenge the accuracy of the PSIR below. Therefore, we will consider the issue in that context.

The PSIR indicates that defendant was continuously in custody from the date of his arrest on October 24, 2006, until at least April 3, 2007, for which he received 178 days of sentence credit. However, it also indicates that he was charged with attempted third-degree fleeing a police officer involving the Southgate Police Department on March 4, 2007, that he entered a plea to that offense on March 30, 2007, and was scheduled to be sentenced on April 20, 2007. We agree with defendant that the record does not support a conclusion that he could have incurred this additional charge while incarcerated for this case. Defendant also observes that the PSIR lists an incorrect date for his arrest for this case as “09/24/2996” and incorrectly lists his conviction date as “09/04/2004.”

Because defense counsel did not challenge the accuracy of the dates contained in the PSIR, the various discrepancies on the face of the PSIR went unresolved, and it is unclear if the discrepancies impacted the sentencing decision. However, resentencing is not necessarily required. Instead, we remand this case to the trial court for a determination whether the disputed matters affected the court’s sentencing decision. See *People v Landis*, 197 Mich App 217, 219; 494 NW2d 865 (1992). If the court determines that it did, defendant is entitled to resentencing. If not, defendant’s sentence may be affirmed, but the inaccurate information should be stricken from the PSIR and a corrected copy forwarded to the Department of Corrections. *Id.*

### IV. Defendant’s Standard 4 Brief

In a Standard 4 brief, defendant argues that defense counsel was ineffective for failing to file a notice of alibi defense and calling two alibi witnesses at trial. Defendant did not raise this issue in an appropriate motion in the trial court, nor was this issue raised at the *Ginther* hearing

on defendant's other ineffective assistance of counsel claims. Therefore, our review is limited to mistakes apparent from the record. *Matuszak, supra* at 48.

"Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *Marcus Davis, supra*. This Court will also not assess counsel's competence with the benefit of hindsight. *Matuszak, supra* at 58. "[T]he failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *Dixon, supra* at 398.

"A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). Where there is a claim that counsel was ineffective for failing to raise a defense, the defendant must show that he made a good-faith effort to avail himself of the right to present a particular defense and that the defense of which he was deprived was substantial. *Id.* A substantial defense is one that might have made a difference in the trial's outcome. *Id.*

In support of his claim, defendant has presented notarized statements from his mother and his sister, who both aver that defendant was at home with them when the crime was committed. However, these statements are not part of the existing record. Further, at the *Ginther* hearing, in the context of addressing defendant's other ineffective assistance of counsel claims, defense counsel explained that a possible alibi defense was never raised and that defendant advised counsel that he could not recall where he was at when the crime was committed. Therefore, counsel focused the defense on Bartell's identification of defendant. In light of this record, defendant has not shown that defense counsel was ineffective for failing to pursue an alibi defense.

Defendant's convictions and felony-firearm sentence are affirmed, and we remand for further proceedings with respect to defendant's sentence for armed robbery and correction of the presentence report in accordance with this opinion. We do not retain jurisdiction.

/s/ Kurtis T. Wilder

/s/ Patrick M. Meter

/s/ Karen M. Fort Hood